Populism and Transparency: The Political Core of an Administrative Norm

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POPLISM AND TRANSPARENCY: THE POLITICAL CORE OF AN ADMINISTRATIVE NORM

Mark Fenster *

I. INTRODUCTION

Transparency has become a preeminent administrative norm with unimpeachable status as a pillar of democracy.2 Over the past several decades, nations throughout the world have enacted new laws promising a more thoroughly visible, accountable state.3 Academics and think tanks have developed and provided support for the claim that information disclosure can help solve political and social problems,4 while non-governmental organizations advocate nationally and transnationally on transparency’s behalf.5 No reasonable elected official would publicly disavow government openness.

But the rise of right-wing populism, reminiscent of older forms of militaristic authoritarianism,6 threatens transparency’s ascent. Recently elected governments in Europe and the Americas represent a counter-
movement away from liberal-democratic institutions that promote the visibility and popular accountability that transparency promises. Under Vladimir Putin, Russia’s expansive state secrecy has enabled widespread corruption. In Hungary, Viktor Orbán’s Fidesz party has consolidated power in order to establish what he has called an “illiberal state” that limits access to information. Brazil’s Jair Bolsonaro, whose election in 2018 constituted a return to authoritarian right-wing leadership after more than a decade of left-wing rule, has reduced government transparency and led attacks on independent journalists. Even the United States, whose fifty-year-old Freedom of Information Act (FOIA) has served as a model for much of the activism that the age of transparency called forth,


has joined this trend under President Donald Trump, whose administration proved less than compliant with FOIA and other administrative laws and norms.13

Contemporary populist movements have not, however, entirely rejected transparency as an ideal. The populist rebuke of power inequities and its advocacy for popular sovereignty implicitly and sometimes explicitly includes a demand for a more visible, accessible state.14 Italy’s populist Five Star Movement, for example, pledged to form an open government by establishing direct communication channels with the public,15 while Donald Trump found electoral success in part by condemning President Obama16 and Hillary Clinton17 for their secrecy, echoing complaints that transparency advocates themselves have made.18

and Implementation, 63 VILL. L. REV. 867, 867 (2019); Pozen & Schudson, infra note 150, at 2–3.
13. See infra Part III-A.

14. See generally MARGARET CANOVAN, THE PEOPLE 85 (2005) (noting that modern democracy’s “sheer complexity offers a standing invitation to populists to insist on returning power to the people, while denouncing as undemocratic all complicating institutional and legal structures”); Paula Diehl, Twisting Representation, in HANDBOOK OF GLOBAL POPULISM, supra note 6, at 129, 131 (identifying as central to populism the embrace of popular sovereignty and denouncing government’s lack of accountability, alienation from the people, and failure to represent the people and their interests.”). Left-wing populists make similar claims. See Marco Damiani, Radical Left-wing Populism and Democracy in Europe, in HANDBOOK OF GLOBAL POPULISM, supra note 6, at 295, 298 (discussing left-wing populist movements in Spain and France).


18. See, e.g., Alex Howard, How should history measure the Obama administration’s record on transparency?, SUNLIGHT FOUND. (Sept. 6, 2016, 12:35 PM), https://sunlightfoundation.com/2016/09/02/how-should-history-measure-the-obama-administrations-
As a recent book on populism explained, populist movements “tend to call for more transparency and the implementation of more democracy . . . to break the alleged stranglehold of the elite” when they are out of power.\footnote{Mudde & Kaltwasser, supra note 6, at 93.} Upon gaining power, populist leaders have continued to decry the secret forces they claim are arrayed against them. Their concerns invoke conspiratorial enemies and a “deep state.”\footnote{Donald J. Trump (@realDonaldTrump), TWITTER (Sept. 6, 2018, 7:19 AM), https://twitter.com/realdonaldtrump/status/1037661562897682432 (“The Deep State and the Left, and their vehicle, the Fake News Media, are going Crazy - & they don’t know what to do.”); Franklin Foer, Viktor Orbán’s War on Intellect, ATLANTIC (June 2019), https://www.theatlantic.com/magazine/archive/2019/06/george-soros-viktor-orban-ceu/588070/ (quoting Hungarian Prime Minister Orbán’s warning of an enemy that is “[n]ot open, but hiding; not straightforward, but crafty; not honest, but base”).} One could simply dismiss populists’ seemingly hypocritical embrace of transparency in the face of their resistance to open government mandates as little more than a cynical ploy by contemptuous leaders who oppose disclosure of their own political and personal dealings in any form.\footnote{See, e.g., Ben Norton, “FOIA Superhero” Launches Campaign to Make Donald Trump’s Administration Transparent, SALON (Nov. 27, 2016, 8:00 PM), http://www.salon.com/2016/11/27/foia-superhero-launches-campaign-to-make-donald-trumps-administration-transparent (quoting FOIA advocate as asserting that “[t]he Trump administration has made it clear that it is entirely hostile to the notion of transparency”).} This is no doubt at least in part true, as right-wing populists generally derogate to second-order status (or worse) a concept rooted in liberal democratic theory and good-government practices.

But as a governance ideal, transparency has important historical connections and conceptual affiliations with populism. It arose from and is based on the presumptions that citizens must see the state that not only rules but serves them, and that failure to achieve that goal creates a state that is illegitimate, inefficient, and corrupt—presumptions that connect directly with populism’s normative ideals. A transparent state, however, requires laws, regulations, and norms. Grafted onto the modern administrative state, the complex rules that impose transparency have required their own technocratic bureaucracy to foster compliance and enable enforcement. Open government’s detailed, voluminous rules and
the complexity of bureaucratic implementation operate in tension with the concept’s populist understanding of a simple, visible state. The relationship between transparency and populism, which has not received sufficient academic attention, illuminates and explains transparency’s complicated politics and administrative frustrations in a period of renewed populism, as well as in the inevitable reaction against it.

This Article explains the connections and tensions between transparency and populism. Part II introduces populism as a general political phenomenon that has emerged and evolved over the past century. Shifting between left and right, and occasionally mixing political elements in novel ways that are contingent upon their particular historical circumstances, populist movements claim to authentically construct and then represent an idea of “the people” in opposition to an “elite” power bloc. Part III discusses how populism’s complaints about secrecy among the elite and powerful overlap with the complaints about secrecy that transparency advocates make. Both populists and transparency advocates tend to view power and its exercise skeptically, and both claim that an


Instead, commentators and political theorists have described transparency variously: as an essential liberal democratic norm and human right that transcends the political, see, e.g., SUZANNE J. PIOTROWSKI, GOVERNMENTAL TRANSPARENCY IN THE PATH OF ADMINISTRATIVE REFORM 10 (2007) (“Not only does transparency give us a better understanding of what government is doing, but it encourages those who work for government to better meet their obligation to us”); Patrick Birkinshaw, Transparency as a Human Right, in TRANSPARENCY: THE KEY TO BETTER GOVERNANCE? 47 (Christopher Hood & David Heald eds., 2006) (“Not only is [freedom of information] instrumentally important in realizing other human rights such as freedom of speech and access to justice or other desiderata such as accountability, it is intrinsically important: the right to know how government operates on our behalf.”); as a consequentialist tool to hold the state accountable and limit corruption, see, e.g., Archon Fung & Stephen Kosack, Does Transparency Improve Governance? 17 ANN. REV. POL. SCI. 65 (2014) (reviewing empirical literature on transparency as an accountability tool); as a lever by which parties and politicians impugn incumbents and opponents, see text accompanying supra notes 102-105; and as a means used by private actors to further commercial and ideological interests. See Margaret Kwoka, FOIA, Inc., 65 DUKE L.J. 1361 (2016) (commercial uses of FOIA); David E. Pozen, Transparency’s Ideological Drift, 128 YALE L.J. 100, 108–15 (2018).

23. Populists view the exercise of power skeptically when they are out of power; transparency advocates view the exercise of power especially skeptically when they are dissatisfied with the lack of information or candor surrounding its use.
increased flow of information and communication enables and even encourages political reform by forcing the state to reveal itself. But they are not identical. Whereas transparency advocates emphasize technical mandates and widely-recognized but unwritten norms of disclosure, populists champion simpler political norms and emotional connections among leaders, movements, and the public. Transparency is understood and promoted in both populist and technocratic registers, and the differences between them at times render the concept contradictory, even perhaps at times meaningless.

Part IV uses Donald Trump’s presidential term as a case study in the relationship between transparency and populism. It begins by describing the extent to which his administration failed to comply with formal administrative laws and well-established disclosure norms. Nevertheless, the former president and his supporters claim that he in fact governed quite transparently through his direct, affective public communication rather than by complying with the laws and norms of public administration. He offered a seemingly accessible version of his thoughts and emotions in real time through his Twitter account and his extended, often improvisational performances during the rallies he continued to hold after his election. Thus, President Trump simultaneously departed from administrative laws and norms while repeatedly invoking their spirit, and in the process sought to reframe transparency’s meaning in terms more favorable to his manner of governance.

Part V concludes by explaining how right-wing populism’s rise has laid bare transparency’s internal conflict between its status as an administrative concept defined and implemented by law, regulations, and norms, and its operation as a contested political concept that overlaps with populism. The tension between these distinct ways of understanding transparency clarifies both transparency’s politics and its limitations and disappointments.

II. POPULISM: THE PEOPLE AGAINST THE ELITE

Populism has regularly waxed and waned as a prominent political force

24. Donald J. Trump (@realDonaldTrump), Twitter (Apr. 24, 2019, 9:47 AM), https://twitter.com/realdonaldtrump/status/1121048120312389634 (“No Collusion, No Obstruction - there has NEVER been a President who has been more transparent.”).
since its formal emergence in the U.S. during the late 19th century,\textsuperscript{25} despite the apocalyptic dangers to democracy its critics regularly predict will follow in populism’s wake.\textsuperscript{26} It continues to play a key role in the modern political understanding of popular sovereignty\textsuperscript{27} and has regained its standing in the last decade. In the U.S. for example, populist ideas circulated in the Tea Party’s insurgency among the Republican base during the Obama presidency, the Occupy Wall Street movement on the political Left, beginning in 2011, and then among both Democrats and Republicans in the 2016 election.\textsuperscript{28} Right-wing populism’s current rise in European nations began well before the 2016 U.S. presidential election,\textsuperscript{29} Left-wing populist parties have been successful in Greece and Spain,\textsuperscript{30} and populism has been a constant and prevalent strain of Latin American politics since the previous century.\textsuperscript{31} Despite scholars’ normative disagreement over populism’s significance, I explain in this Part, the academic literature has reached a general consensus about certain of its characteristics.\textsuperscript{32}
A. Populism’s Dualist Vision

Current and past populist movements tend to share strong but thin political commitments. Most significantly, they promote deep-seated, dualist visions of the political and social world, on one side of which stands the “people” that a movement calls into existence and whose interests it claims to champion. On the other side is the existing structure of power and the power bloc that controls it. This dualism reduces political debate and noise to simple binaries between vague, undefinable categories. Populist movements and leaders promise to transform the political and social order by restoring the people (in whatever way they are defined) to their rightful place in power and moral authority through self-rule. What was once broken will be repaired; the people that had been divided will find a unified wholeness under their own direct rule.

Populism’s foundational division between people and the power bloc produces three additional binaries that lend specificity and definition to each populist movement. The first is that the power bloc represents the interests of an “elite.” Individual movements fill this vague category distinctly. Right-wing populists generally define the elites they oppose in intellectual and cultural terms, while left-wing populists tend to concentrate their hostility on economic elites. The population of these elites may overlap, but different kinds of populist movements condemn elites for perpetrating different wrongs. Second, populist movements

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34. See generally ERNESTO LA CLAU, ON POPULIST REASON 18 (2005) (explaining that populist reason “simplifies the political space, replacing a complex set of differences and determinations by a stark dichotomy whose two poles are necessarily imprecise”).
35. See MUDDE & KALTWASSER, supra note 6; MÜLLER, supra note 6; MÜLLER, supra note 25, at 2–3; Canovan, supra note xx, at 3–4.
36. MUDDE & KALTWASSER, supra note 6, at 11–14; MÜLLER, supra note 25, at 2–3; Canovan, supra note xx, at 3–4.
37. MUDDE & KALTWASSER, supra note XX, at 12–13; MÜLLER, supra note xx, at 2–3; Canovan, supra note 31, at 3–4.
express deep skepticism about pluralism as a political theory and about pluralistic governance as a preeminent institutional and procedural principle. This binary rests on a deep suspicion of governing institutions, including the state, civil service, and political parties, which appear structurally and inevitably unjust to unprivileged commoners. Electoral contests too appear unfair or even fixed. Third, the boundary between people and the power bloc radiates from some defined identity, drawn in terms of nation, race/ethnicity, masculinity, class, or some combination thereof. The idea of a “people” draws categorical boundaries between those who are within and outside of the group, in the process shaping the individual and group ideal of the people whose interests the movement would further.

B. Populism’s Claim to Authenticity

Populist movements contend that the existing power bloc fails to represent the legitimate majority’s true interests. At its core, populism’s anti-elitism rejects what it views as the hidden nature of the present institutional order. Bureaucracies that operate and communicate in a technocratic manner—relying on their expertise as authority, engaging in complex but facially fair procedures, and communicating in dry, neutral language—appear especially suspect when contrasted with a populist

38. MÜLDER & KALTWASSER, supra note 6, at 7–8; MÜLLER, supra note 25, at 3.
40. MÜLDER & KALTWASSER, supra note 6, at 18–19; MÜLLER, supra note 25, at 3–4. Current right-wing populist movements have tended to emphasize national identity as their core principle, but they often tie their idea of nationhood to race, ethnicity, and ideology as well. As Benjamin De Cleen has argued, populism and nationalism are not coextensive, and just as not all populists are nationalists, so not all nationalists are populists. See Populism and Nationalism, in OXFORD HANDBOOK OF POPULISM, supra note 31, at 342, 358–59.
41. Populism’s theory of representation presumes that distance and intermediation necessarily interfere with popular sovereignty and therefore prevent the people’s rule. For more complex theories of representation, see, for example, HANNA PITKIN, THE CONCEPT OF REPRESENTATION (1967) (the canonical consideration of the issue in political theory); Mónica Brito Vieira, Introduction to RECLAIMING REPRESENTATION: CONTEMPORARY ADVANCES IN THE THEORY OF POLITICAL REPRESENTATION (Mónica Brito Vieira ed., 2017) (providing a history and literature review of representation as a concept in political theory).
style that appeals directly to the people in plain, emotional language. Any legislative and executive institutions that would illegitimately buttress state authority while falsely claiming to represent the people do so without the people’s knowledge or approval.

Populist movements make two promises to correct this problem: they pledge to remove the distance between the people and state by offering a truer form of representation, one that authentically pursues the public’s real interests by respecting the people’s sovereignty; and they promise to banish anything hidden from the public that would interfere with this newly direct, redemptive relationship between state and public. The people will rule themselves through their authentic representative(s). Benjamin Arditi has characterized populism’s ability to engage “an imaginary identification” among movement followers that feels direct and unmediated.

The charismatic leadership that populist movements typically rally around helps to create such identification, allowing one or a small number of leaders to represent and speak for the whole, in the process establishing popular loyalty to the leader and group. The immediacy of these feelings, apparent in followers’ evident devotion to the populist cause or leader at gatherings and rallies, demonstrates what Chantal Mouffe has identified as the “passions” of collective populist identity—passions that existing political institutions consider suspect and prevent from expression.

Populist movements often appear insurgent...
and angry at the economic and social conditions under which their followers claim to suffer, and their members invest themselves emotionally in both the identity that the group has constructed and in the movement’s leadership.\(^{50}\)

Whether embodied in an individual or dispersed within a party or movement, populist leadership claims to constitute true representation for a singular people.\(^{51}\) Leaders express the popular will simply and starkly, often through direct, performative mediated address to a mass audience that takes advantage of their stature and celebrity.\(^{52}\) They traffic in stereotypes, emphasize action, and offer what they propose as “common sense” solutions rather than technical or abstract ones.\(^{53}\) Indeed, their claim to truly represent the people in opposition to an elite establishment invites them to exercise ostensibly bad manners, creating offense by speaking bluntly and outrageously.\(^{54}\) Populists channel the popular will by attempting to speak in the people’s voice more honestly and bravely than the people themselves.

Populism is therefore not merely a group response to external stimuli (such as an economic crisis), but a political and cultural style that is creatively syncretic.\(^{55}\) Populist movements link together shared (if not

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51. See MÜLLER supra note 25, at 20–23; SHILS, supra note 41, at 98–104.
52. MOFFITT, supra note 42, at 84–87 (2016); Julianne Stewart et al., Conclusion: Power to the Media Managers, in THE MEDIA AND NEO-POPULISM: A CONTEMPORARY COMPARATIVE ANALYSIS 217, 228 (Gianpetro Mazzoleni, Julianne Stewart & Bruce Horsfeld eds., 2003). On the global rise of celebrity politicians, and their relationship to populism, see generally DARRELL M. WEST & JOHN ORMAN, CELEBRITY POLITICS (2003); MARK WHEELER, CELEBRITY POLITICS: IMAGE AND IDENTITY IN CONTEMPORARY POLITICAL COMMUNICATIONS (2013); David Marsh, Paul ’t Hart & Karen Tindall, Celebrity Politics: The Politics of the Late Modernity, 8 POL. STUD. REV. 322 (2010).
53. MUDDE & KALTWASSER, supra note 6, at 68.
55. See Canovan, supra note 31, at 4–5 (noting populism’s affirmative as well as reactive tendencies); MOFFITT, supra note 42, at 50–51.
necessarily correct) understandings of the past, criticisms of present conditions, and visions of the future to form a new political framework built upon issues that dominant parties and institutional politics ignore or fail to acknowledge fully. Their invocation of a “people” is at once affirmative, insofar as it builds a constituency through a collective identity, and oppositional, since in doing so it excludes those outside the group and constructs an enemy that seeks both to protect its status as “elite” and to relegate the people to subservience. At bottom, populist movements intend to redeem and remake the world in the people’s image (as they would define it), under the people’s rule, led by the people’s authentic representative(s). They promise a state that will serve directly, instrumentally, and affectively in the people’s interest—whatever that people is, and whatever that people purportedly wants.

C. Populism’s Contingency

Populism’s Manichean vision and simple narrative—the identifiable people in pitched battle against a power bloc that controls the existing, seemingly democratic institutions—render it so vague as to be seemingly meaningless as a political idea. Individual populist movements can incline left or right, or offer a mix of proposals from different points on the present political spectrum; they can also evolve in directions seemingly opposite from where they started, especially once they find success, while remaining true to the basic storyline they convey. And the narratives they offer appear to pull in opposite directions, driven by an internal tension between populism’s claims to offer radical change or revolutionary transformation and its defense of a nationalist identity or cherished, long-lost political principles. The emergence and development of any movement therefore proves highly contingent on a nation’s or region’s internal political dynamics—including its political system and

56. LACLAU, supra note 33, at 18; Canovan, supra note 31, at 4–5.
57. On populism as constituting a strong form of democracy’s “redemptive” face, see Canovan, supra note 31, at 9–14.
58. See MÜLLER supra note 25, at 8–10.
59. See MOUFFE, supra note 31, at 11. Examples in the U.S. of figures who have individually shifted from positions typically recognized as leftist to those understood as right-wing include William Jennings Bryant, Tom Watson, and Father Charles Coughlin. See MICHAEL KAZIN, A GODLY HERO: THE LIFE OF WILLIAM JENNINGS BRYANT (2006); KAZIN, POPULIST PERSUASION, supra note 43, at 40–46, 74–80.
parties—as well as on the current issues to which an individual movement appears to be responding. This is equally true on different continents, as the populism of North and South America differ considerably from that of Europe, reflecting distinctions in political cultures, respective histories as colonialists and colonies, and their relative states of economic development.

As a result, populism does not function as a freestanding political concept in the manner of socialism, fascism, or neoliberalism, each of which at least appear to sit somewhere on the political spectrum and stand for something (even if their boundaries and substance might be contested). Putative populist movements either operate within or find themselves labeled as part of the political institutions and traditions that they criticize. Among conservatives, “right-wing populists” and so-called “authoritarian populists” distinguish themselves from elite or Burkean conservatives. The “populist left” stands in opposition to the drift among leftists and liberals towards neoliberalism and centrist. At the same time that they radically challenge institutional parties, right- and left-wing populists can draw from the same pool of disaffected voters. In the 2016 presidential election, for example, Donald Trump’s populist claims to represent forgotten populations attracted at least some of those who had backed Bernie Sanders in the Democratic primaries, despite the stark


61. See OXFORD HANDBOOK OF POPULISM, supra note 31 (highlighting the connections and comparative distinctions and departures among the populist governments and movements in different nations and on different continents); see also Carlos de la Torre, Populism in Latin America, in OXFORD HANDBOOK OF POPULISM, supra note 31, at 195, 196–203 (describing wide variety of populist movements and leaders in Latin America).

62. See Canovan, supra note 31, at 4 (noting populism’s contingency and rejecting the notion of a populist “ideology”).


64. See, e.g., MOUFFE, supra note 31 (arguing that to be relevant and recapture the ground lost to authoritarian populism and neoliberalism, the left should embrace a form of democratic populism); DONATELLA DELLA PORTA, SOCIAL MOVEMENTS IN TIMES OF AUSTERITY: BRINGING CAPITALISM BACK INTO PROTEST ANALYSIS 96–102 (2015) (discussing Occupy Wall Street and other recent left populist movements).
divergence in their stances on particularly salient policy issues.\textsuperscript{65}

This suggests that populism operates as a performative, rhetorical practice, which allows different populist movements to share common tropes while they articulate distinct political demands tied to the time and place of their emergence.\textsuperscript{66} As the British sociologist Peter Worsley explained, populism operates as “a dimension of political culture in general, not simply as a particular kind of overall ideological system or type of organization.”\textsuperscript{67} Viewed as a contingent political phenomenon based on a set of vague but powerful binaries, populism is ultimately less a political program than a “style,”\textsuperscript{68} a political rhetoric,\textsuperscript{69} or a “mode of political representation”\textsuperscript{70} that movements can appropriate to fit a given set of concerns that are being ignored and to rally a segment of the population that feels disregarded.

III. TRANSPARENCIES: A TECHNICAL, POLITICAL, AND POPULIST NORM

Like populism, government transparency is not simply one thing. Everyone on the present political spectrum appears to embrace it as an administrative norm (at least in theory), while its precise political valence has evolved over the past five decades.\textsuperscript{71} Most broad historical and theoretical accounts of transparency associate its rise with progressive

\begin{thebibliography}{99}
\bibitem{moffitt} See Moffitt, supra note 42, at 104–08 (characterizing populism’s invocation of “the people” as performance); see generally Michael Seward, \emph{The Representative Claim} (2010) (emphasizing the role of aesthetic and cultural components and an ongoing performance engaged in by a representative to gain acceptance by a public).
\bibitem{worsley} Peter Worsley, \textit{The Concept of Populism, in Populism: Its Meaning and National Characteristics}, supra note 31, at 212, 245.
\bibitem{kazin} Kazin, Populist Persuasion, supra note 43, at 192–93.
\bibitem{arditi} Arditi, supra note 46, at 78–87.
\bibitem{schudson} See Michael Schudson, \textit{The Rise of the Right to Know: Politics and the Culture of Transparency, 1945-1975}, at 4 (2015) (“Right, left, and center, there is broad support for the ideal of transparency.”)
\end{thebibliography}
good governance reforms, although specific chronicles of open government legislation in particular jurisdictions note that party politics and interbranch conflicts often motivate new transparency reforms. Taken together, these accounts demonstrate that “transparency” is neither an essentially progressive, partisan, nor libertarian administrative norm—although elements of each have both structured the norm historically and occasionally emerged to dominate advocacy efforts. Nevertheless, the term’s political and symbolic authority allows the transparency ideal to transcend political partisanship and to take on different meanings based on context and on those who claim its mantle.

This Part considers transparency’s multiple meanings and applications. It first identifies transparency’s prescription in the laws and norms that attempt to open a sprawling bureaucracy to view. Open government laws inevitably prove long, complicated, and legalistic, and require continual enhancement and enforcement against the vast complex of government entities that make up the modern state. This legal and normative machinery constitutes transparency’s technocratic arrangement—the means by which the state is made accessible, legitimate, and above all democratic through a set of technical rules. Then this Part turns to transparency as a concept that both needs political support and is part of partisan and institutional conflict. Finally, this Part argues that, in the process of its political use, transparency’s populist elements can predominate and undercut its technocratic implementation.


73. For monographs that discuss the politics of freedom of information laws in individual countries, see, for example, SCHUDSON, supra note 70, at 37–63 (on the U.S.); BEN WORTHY, THE POLITICS OF FREEDOM OF INFORMATION: HOW AND WHY GOVERNMENTS PASS LAWS THAT THREATEN THEIR POWER 9–11 (2017) (U.K.); and PRASHANT SHARMA, DEMOCRACY AND TRANSPARENCY IN THE INDIAN STATE (2015).

74. On FOIA’s many amendments over the past fifty years, for example, see Sami Kerzel, FOIA: Then and Now, DOCUMENTS TO THE PEOPLE, Winter 2016, at 22, available at https://journals.ala.org/index.php/dttp/article/view/6226/8103.

75. The distinction I pose here between transparency’s technocratic and populist conception parallels Jack Balkin’s use of progressivism and populism as “ideal” types in constitutional theory. J.M. Balkin, Populism and Progressivism as Constitutional Categories, 104 YALE L.J. 1935, 1944 (1995). My use of the terms is not concerned with theory so much as its application: the technocratic effort to develop and enforce rules and the deployment of populist rhetoric and ideas by historical actors. I situate my account of transparency’s technocratic side within the concept’s development as an administrative norm and my account of populism within its development in U.S. political history.
A. Technocratic Transparency: Open Government as an Administrative Norm

Sprawling both organizationally and spatially, modern government resists visibility. Open government laws cannot magically and perfectly unveil the state; rather, they can only address the traces of state operations through legislation that attempts to mitigate bureaucracies’ inevitable information hoarding. The disclosure of federal government records in the U.S., for example, is mandated by a variety of laws, including the Freedom of Information Act (“FOIA”), while sub-federal states have their own analogous but also quite distinct and variable laws. Various preservation statutes require that these records are maintained and archived. Open government laws create specific exemptions from disclosure for certain types of records. Federal and state laws require meetings to be open to the public, although the scope of these laws varies widely among the various statutes and state constitutions that establish the mandates. Administrative laws that regulate agency rulemaking and adjudication require the disclosure of some government outputs that have legal effect, as well as some of the inputs government produce and relies upon to produce them. None of these laws are mechanical. Rather, each relies upon broad, ambiguous standards and multi-factor balancing tests established in complex statutes and court decisions.

76. See DAVID BEETHAM, BUREAUCRACY 101-02 (2d ed. 1996); 2 MAX WEBER, ECONOMY AND SOCIETY (Guenther Roth & Claus Wittich eds., 992 1968).
77. See Mark Fenster, Seeing the State: Transparency as Metaphor, 62 ADMIN. L. REV. 617, 643–47 (2010) [hereinafter Fenster, Seeing the State].
80. See, e.g., Government in the Sunshine Act, Pub. L. No. 94-409, 90 Stat. 1241 (codified as amended in scattered sections of 5 and 39 U.S.C. (1976)) (federal open meetings law); FLA. CONST. art. I, § 24 (providing individual right of access to public records and meetings); CAL. GOV’T CODE § 54950 et seq. (Ralph M. Brown Act, California’s open meetings law).
81. See, e.g., 5 U.S.C. § 553(b), (c) (2018) (requiring federal agencies conducting informal rulemaking to publish proposed rules in Federal Register and to incorporate in the final rules “a concise general statement of their basis and purpose”).
82. For examples of contested, ambiguous language in open government laws, consider two of the most recent FOIA decisions from the U.S. Supreme Court, which settled long-disputed language in FOIA
The federal versions of these laws in the U.S. focus on the executive branch. But the President and White House (which enjoy certain constitutional privileges from disclosure) and federal agencies represent only part of a much broader set of U.S. leviathans. By Constitution and statute, the U.S. Congress and federal Judiciary face their own set of more limited disclosure requirements. And private entities and individuals interact extensively with U.S. government entities, whether by performing governmental duties or finding themselves subject to regulatory enforcement. Open government laws vary in how they resolve the difficult issue of when the public nature of the work that private entities and public-private partnerships perform and their interactions with the state compels disclosure. State constitutions and statutes handle these same issues distinctly, while the federal constitution establishes only a minimal baseline of disclosure requirements and rights of access.


83. See 5 U.S.C. § 552 (2018) (applying FOIA only to “each agency,” which is defined in 5 U.S.C. § 551(1) to exclude, among other entities, Congress and the courts).
87. See generally Alfred C. Aman, Jr. & Landyn Wm. Rookard, Private Government and the Transparency Deficit, 71 ADMIN. L. REV. 437, 446-49 (2019) (discussing FOIA’s limitations in when government privatizes or works with private actors); Anne Joseph O’Connell, Bureaucracy at the Boundary, 162 U. PA. L. REV. 841, 894–97 (2014) (examining the problem facing efforts to apply the APA and FOIA to hybrid, “boundary” agencies).
88. See Houchins v. KQED, Inc., 438 U.S. 1, 9 (1978) (holding that the First Amendment provides no general “right of access to all sources of information within government control”); see generally Fenster, Seeing the State, supra note 76, at 641–43 (identifying limited federal constitutional rights of access to information and the variability of rights created by state constitutions).
In sum, transparency in the U.S. and elsewhere has proven difficult to legislate and enforce. Its imposition has required complex laws that parse fine distinctions in order to balance competing interests. Attorneys and professionals have developed special expertise for those representing the public and government. Officials who oversee government records receive compliance training, and some statutes excuse agencies from fee-shifting provisions if they acted in good faith in implementing a complex, often ambiguous statute. Legislators, officials, attorneys, and courts must resolve the highly technical questions these laws and their interpretations create. Transparency is imposed at a level far removed from the eyes and ears of the public, in government and legal offices and

89. See generally WORTHY, supra note 72, at 12-14 (describing the clash between transparency’s symbolic value and the institutions that the implementing laws affect).

90. Although numerous websites, including the federal government’s own FOIA.gov, assist laypersons in filing an initial request, the process becomes increasingly complex when an agency denies a request either in part of whole. A how-to guide produced and posted on the Internet by the National Security Archive (an NGO that extensively uses FOIA) warns that as a requester moves through the administrative appeals process following a full or partial denial from an agency, it will need an increasing amount of legal knowledge and should seek representation if she decides to file suit. NAT ’ T. SEC. ARCHIVE, EFFECTIVE FOIA REQUESTING FOR EVERYONE 29–51 (2008), available at https://nsarchive2.gwu.edu/nsa/foia/foia_guide/foia_guide_full.pdf; see also id. at 52 (“Bringing a lawsuit requires a commitment of time and resources. . . . Although you may litigate a case without an attorney, it may be difficult to make an impact on your own if you are not familiar with case law and court procedures.). FOIA litigation requires attorneys themselves to develop special expertise. For example, courts have developed special rules to assist them in ruling on summary judgment motions in FOIA litigation. See Summers v. Dep’t of Justice, 140 F.3d 1077, 1080 (D.C. Cir. 1998) (explaining rules developed in response to the “peculiar nature of the FOIA”); cf. Margaret B. Kwoka, The Freedom of Information Act Trial, 61 AM. U. L. REV. 217, 227 (2011) (noting the difficulty of distinguishing law and fact issues in FOIA litigation and complaining that courts regularly decide FOIA cases on summary judgment, using the procedure they have developed, despite the dominance of contested fact questions in their decision).

91. See, e.g., 5 U.S.C. §§ 552(j), (j)(2)(F) (2018) (requiring federal agencies to create a “Chief FOIA Officer” and mandating that the official “offer training” to personnel regarding their duties under FOIA); ARIZ. REV. STAT. ANN. §§ 41-1376.01(a) (2019) (establishing ombudsman to help train agencies on their responsibilities under state public access law).


in courtrooms, as a specialized, complex, internal project led by specially-trained experts.

The extent of these mandates’ impacts proves difficult to judge, given the abstract goals that the norm is intended to meet and the challenge of measuring its benefits and costs. As a public administration scholar who specializes in transparency has recently noted, its impact will at best prove “gradual, indirect, and diffuse.”94 This is especially true given both the difficulty in evaluating the causal effects of a broad administrative norm imposed by narrowly applied, technical legal mandates,95 and the hazy, uneven relationship between transparency and government accountability.96 Moreover, some studies have found evidence that transparency can demoralize the public as much as it leads them to participate knowledgeably in democratic elections.97 Critics have more recently argued that open government laws have been crippled by underfunding and insufficient compliance98 and that transparency has been turned into a corporatist anti-regulatory tool.99 One prominent legal academic has even argued that FOIA has come to constitute a fetish object

95. See Maria Cuccinello et al., 25 Years of Transparency Research: Evidence and Future Directions, 77 PUB. ADMIN. REV. 32 (2017); see also Jenny De Fine Licht et al., When Does Transparency Generate Legitimacy? Experimenting on a Context-Bound Relationship, 27 GOVERNANCE 111 (2014) (noting the important role that political and administrative context plays in the impact of transparency policies on institutional legitimacy).
96. See Jonathan Fox, The Uncertain Relationship Between Transparency and Accountability, 17 DEV. IN PRAC. 663, 668-69 (2007).
97. See, e.g., Monika Bauhr & Marcia Grimes, Indignation or Resignation: The Implications of Transparency for Societal Accountability, 27 GOVERNANCE 291, 309-11 (2014) (noting that under certain conditions, exposure of corruption can lead the public to despair rather than to hold state actors accountable); see generally BRUCE E. CAIN, DEMOCRACY MORE OR LESS: AMERICA’S POLITICAL REFORM QUANDARY 67 (2015) (arguing that transparency can undercut trust in electoral democracy).
98. See generally Margaret Kwoka, FOIA, Inc., 65 DUKE L.J. 1361 (2016) (showing how use of FOIA by for-profit requesters crowds out more traditional and intended requests); Pozen, Freedom, supra note 2, at 1124-25 (discussing congressional underfunding of agency compliance efforts); Daxton R. “Chip” Stewart & Charles N. Davis, Bringing Back Full Disclosure: A Call for Dismantling FOIA, 21 COMM. L. & POL’Y 515, 517–18 (2016) (characterizing FOIA as “petrified” and “a tool for preserving secrecy”).
that clogs rather than assists in executive branch administration.\textsuperscript{100} No matter the extent of critique of the general concept and its technocratic mandate, transparency viewed this way attempts to marginally increase the state’s visibility through intermittently effective regulations on government behavior.\textsuperscript{101}

\textbf{B. Political Transparency: Open Government as a Political Norm}

Although an administrative and technocratic norm, transparency is also deployed politically, and in that guise is made to speak in a distinct register. Candidates, parties, and elected officials use both their opponents’ alleged secrecy and the threat of exposure to their political advantage.\textsuperscript{102} Legislatures enact open government laws for political gain, whether as part of interparty or interbranch competition.\textsuperscript{103} Political parties and officials tend to embrace open government laws when out of power (although they resist enforcement or downplay the laws’ importance once in office).\textsuperscript{104} Thus even the most seemingly neutral good-government laws develop in a partisan context and require political support for their enactment. At the same time, presumptively non-partisan, apolitical civil society groups—including the press and non-governmental organizations—engage in political campaigns on transparency’s behalf by promoting and lobbying on


\textsuperscript{101} See generally Michener, \textit{Gauging the Impact}, supra note 93, at 139 (calling for scholars and funders to concede that, and to develop methodological approaches for evaluation that can better capture transparency’s marginal impacts).

\textsuperscript{102} See, e.g., text accompanying supra note 22 (noting Trump’s criticism of Hillary Clinton during 2016 campaign); FENSTER, supra note 22, at 6–7 (noting Obama’s criticism of his predecessor’s secrecy practices during 2008 campaign).


behalf of open government laws.\textsuperscript{105}

Within this political context, open government laws come draped in powerfully symbolic language that make the laws appear to transcend politics. These laws proclaim their importance in titles that promise a tangible, visible state which is directly answerable to its public.\textsuperscript{106} Proponents declare the laws will provide “sunshine” or sunlight to an otherwise darkened bureaucracy,\textsuperscript{107} “free” government information from official clutches,\textsuperscript{108} and grant the public a “right to know” the government and its actions.\textsuperscript{109} To make the case for transparency, advocates regularly invoke Louis Brandeis’s famous dictum about sunlight’s power as a disinfectant.\textsuperscript{110} In the words of the Sunlight


\textsuperscript{106} On the recurring use of “sunshine” and “freedom” as metaphors in open government law and the importance of such symbolism to transparency advocacy, see Fenster, \textit{supra} note 22, at 3–6.


\textsuperscript{109} See generally Fenster, \textit{supra} note 21, at 28–30 (on the origins of the term “right to know” among U.S. transparency advocates); see, e.g., G.A. Res. 217 (III) A, Universal Declaration of Human Rights (Dec. 10, 1948) (“Everyone has the right to . . . seek, receive and impart information and ideas through any media and regardless of frontiers”); Emergency Planning and Community Right-to-Know Act, 42 U.S.C. §§ 11,001–50 (1994) (requiring firms and individuals to report to state and local governments the quantities of potentially hazardous chemicals that have been stored or released into the environment).

\textsuperscript{110} For examples of the many uses of Justice Brandeis’s metaphor, see Fenster, \textit{Seeing the State}, \textit{supra} note 76, at 626 n.28. On Justice Brandeis’s work, see Pozen, \textit{Drift}, \textit{supra} note 71, at 108–10.
Foundation, an influential Washington, D.C.-based NGO focused on transparency that closed in September 2020, “We believe that information is power, or, to put it more finely, disproportionate access to information is power. We are committed to improving public access to public information by making it available to the public, online.”\textsuperscript{111} Calaware, an NGO focused on advocating open government in California, describes its mission as helping to enforce “people’s rights to find out what citizens need to know to be truly self-governing” and fighting “excessive official secrecy” and “intimidation or retaliation” against those who inquire about or report government actions.\textsuperscript{112} Advocates deploy vivid political arguments about transparency in hopes of persuading others of transparency’s status as an essential democratic norm.

C. Transparency Against the State: Open Government as a Populist Norm

The politics of transparency are rooted in populism’s understanding of state power. Advocates invoke populism’s dualist view of the state and public\textsuperscript{113} by promising individual and collective self-rule that would allow the people to act in a responsible and informed manner in order to check a secretive, possibly corrupt state whose officers constitute an elite and secretly act on others’ behalf to advance narrow interests.\textsuperscript{114} As an ideal, transparency springs not only from an affirmative embrace of deliberative democratic ideals, but also from a fear of concentrated power and of government venality, as well as from

\textsuperscript{111} Our Mission, SUNCITY FOUND., https://sunlightfoundation.com/about/ (last visited Aug. 29, 2019).

\textsuperscript{112} Our Mission, CALIFORNIANS AWARE, https://www.calaware.org/about/our-mission/ (last visited Aug. 29, 2019).

\textsuperscript{113} See supra Part I-A.

the public distrust that results from secret power’s excesses.115

In addition, transparency promises to create and mobilize a popular will, guaranteeing a more direct, authentic, and populist relationship between the public and those who would represent and lead it.116 Like a populist movement or leader, or in conjunction with one, transparency promises to remove the distance between the public ("we") and the state by putting an informed public back in charge—a public that can truly know its leadership through the flow of information. The National Freedom of Information Coalition, a group of national and state-level NGOs that advocate for journalists and freedom of information laws, has declared that its mission is “to foster transparent state and local government, which in turn leads to increased civic engagement, self-governance, public-affairs journalism and civic information, and ultimately a better-informed and more trustful society and democracy.”117 This new “society and democracy”—with a more engaged public that is better capable of governing itself—will support a government that is more trustworthy and representative. The state’s visibility will make it known rather than secret, honest rather than corrupt, and authentic rather than deceitful. As Emmanuel Alloa has argued, transparency promises that “only where nothing is withheld can things be genuine and subjects true to themselves.”118 Like populism, transparency imagines creating a politics of close proximity, where the state communicates directly and fully with the public and furthers the public’s will.119

And like populism, transparency appears to have no necessary affiliation with the political left or right. Its roots lay in the progressivism

115. See generally Pozen, Drift, supra note 71, at 116–22 (summarizing the arguments made on behalf of the various open government laws enacted from 1966–76).

116. See supra Part I-B.


118. Emmanuel Alloa, Transparency: A Magic Concept of Modernity, in TRANSPARENCY, SOCIETY AND SUBJECTIVITY 21, 32 (Emmanuel Alloa & Dieter Thomä eds., 2018); see also Oana Brindusa Albu & Mikkel Flyverbom, Organizational Transparency: Conceptualizations, Conditions, and Consequences, 58 BUS. & SOC’Y 268, 276 (2019) (transparency allows the public to access “authentic reality that is considered to be pre-existing and independent of the representations produced in the name of transparency”).

119. See supra Part I-C.
of the early twentieth century, especially as that tradition developed in support of the midcentury expansion of the administrative state. The promises of transparency advocates have echoed earlier efforts to reform the modern state during the so-called Populist and Progressive eras that sought to expand popular control over the U.S. federal and sub-federal government. Over the past several decades, civil society watchdogs have continued to emphasize transparency as part of more longstanding “good-government battles” to protect and expand the public’s input into elections and government accountability. Nevertheless, as David Pozen has argued, transparency advocacy has not solely been the province of the progressive and populist left, having drifted recently in a more conservative and libertarian direction. Corporate interests have more widely used open government laws and congressional rules as part of their efforts to oppose legislatures and administrative agencies that would regulate them, and as lawmakers and administrators have replaced command and control regulatory programs with disclosure-based regulations. Pozen has critiqued transparency as a “relatively empty concept, normatively, in the absence of a stable political referent” whose meaning and influence is altered by shifts in “culture, technology, demography, political organization, and so on [that] will invariably alter its social and semiotic significance.” Transparency’s vacuity, he argues, leaves the concept vulnerable to use by interests iminical to its progressive roots, and renders it suspect as a political tool on which progressives can confidently rely.

But like populism, transparency does not become an empty concept or


123. Id. at 124–41.

124. Id. at 151 n.231; see also id. at 104 (characterizing transparency as a “protean concept that may be invoked in a wide range of settings for a wide range of ends”).

125. Id. at 106; see also id. at 104 n.9 (characterizing transparency’s political valence as resulting from “the interactions over time between various legal instantiations of transparency and various political actors seeking to access or control information”).
administrative norm simply because of its uptake and use by a variety of political movements. Transparency also rests on a theory of power and of the state. Indeed, since its beginnings in the Progressive Era, the reaction to the expansion of government secrecy which led the press to initiate its campaign for open government, and popular discontent following the Vietnam War, the Watergate scandal, and President Nixon’s resignation, transparency has been defined in part by its roots in populist discontent with the state and with the state’s detached relationship to the public. A freer flow of information, along with a concrete right to challenge officials’ unwillingness to disclose, promises to restore the state to its position as an instrument of the public’s will, capable of accurately furthering the public’s interest. This view of state power is constitutive of transparency’s understanding of democratic governance and of disclosure’s consequences, even as it stands ready for appropriation by political movements of all types. Populism’s core claim about a secret power bloc serves as an important source for the charismatic authority that transparency can claim as an administrative norm. This Article discusses the important differences between transparency and populism in Part IV after identifying how their continuities have allowed contemporary populists like Donald Trump to claim—plausibly, to his supporters—that he governed transparently even when he was clearly less transparent than the technocratic rules and norms which implement the concept require.

IV. TRANSPARENCY IN THE TRUMP ADMINISTRATION

Nearly midway through his term, President Trump tweeted a complaint about the long-delayed report from the Department of Justice’s Inspector General on FBI Director James Comey’s handling of the controversy surrounding Hillary Clinton’s use of a private email server while she was Secretary of State during the Obama administration: “There are so

126. Id. at 106.
many horrible things to tell, the public has the right to know. Transparency!"129 This was neither the first nor final time he used “transparency” or “transparent” in a presidential tweet, and he began using both terms before the 2016 presidential campaign.130 During his time in office, President Trump often characterized himself as the “most transparent” president in history,131 going so far as to hold open in the interest of “transparency” a high-stakes meeting with congressional leaders over ending a shutdown of the federal government.132 When asked, Trump supporters tended to agree with his self-assessment.133


This Part evaluates President Trump’s and his supporters’ claims. The Trump administration did not make the federal bureaucracy more visible in a technical sense. No one should be surprised by this. In his private career, Trump frequently threatened reprisal and litigation against anyone who exposed his business practices,\(^\text{134}\) and his apparent distaste for the First Amendment rights of his critics\(^\text{135}\) as well as his penchant for controlling information about himself\(^\text{136}\) suggested that his administration would not be as compliant with the letter or spirit of open government laws as those that came before. The first section considers how well his administration fulfilled the public’s “right to know” and furthered government transparency in a traditional sense: by complying with legal mandates in disclosure and administrative laws, with congressional demands for information, and with the less-formal norms by which elected officials and candidates have released information. It finds that the administration largely, and in some respects completely, failed effectively to do so. The second section considers the alternative understanding that Trump and his supporters have given to the concept of transparency. Given his penchant for lying, Trump’s claim to have been a transparent president could simply be dismissed, as could the views of his supporters who seemed not to have noticed or cared about the lack of


empirical support for Trump’s claims. But even if justified, dismissing Trump’s claim misses the particular idea of transparency that the claim embraces, one that was most clearly on display in the open-ended and seemingly improvisational “real” communication of his voice and perspective via social media and political rallies.

A. Compliance with Transparency-Related Laws and Norms

1. Documentary Disclosure and Open Data

The most prevalent way that transparency is understood and measured is through documentary disclosure, which U.S. federal law mandates in FOIA. The extent of any administration’s compliance with FOIA mandates is difficult to gauge, given the vast number of requests made of hundreds of administrative agencies across the federal government and the disparate response to legislative commands and executive control. Nevertheless, the Trump administration did not fulfill its FOIA obligations as well as its predecessor. One analysis found that the Trump administration censored, withheld, or claimed it could not find

137. See In 928 Days, President Trump Has Made 12,019 False or Misleading Claims, WASH. POST, https://www.washingtonpost.com/politics/trump-claims-database/ (last visited Aug. 29, 2019) (finding that as of August 5, 2019, President Trump had made 12,019 false or misleading claims in less than three years). He falsely claimed to be the most transparent president in history at least thirteen times. See id.

138. See Pozen, Freedom, supra note 2, at 1105-06 (noting FOIA’s centrality as a global model for transparency).


requested records at a higher rate than the Obama administration. The number of lawsuits filed against the federal government for alleged non-compliance steadily rose after Trump’s inauguration, especially against top executive branch agencies like the Department of Justice and the Department of Homeland Security, exceeding the number of suits filed against previous administrations. An increase in lawsuits challenging agencies’ failures to respond at all to requests accounts for most of this increase, as FOIA litigation contributes to lengthier legal disputes. The Environmental Protection Agency (“EPA”), which prominently pursued the Trump administration’s deregulatory agenda, proved especially resistant to FOIA requests. At the same time, the administration brazenly refused to comply with the record-retention


requirements of the Presidential Records Act (“PRA”).\footnote{44 U.S.C. §§ 2201 et seq. (2018).}

\footnotetext[146]{44 U.S.C. §§ 2201 et seq. (2018).}


\footnotetext[152]{See Cass R. Sunstein, Output Transparency vs. Input Transparency, in TRouBLING TRANSPARENCY, supra note 150, at 187, 190–92.}
after Trump’s inauguration, the administration removed, manipulated, and censored data that had been available on agency websites and the data.gov portal that the Obama administration initiated.\footnote{See Nathan Cortez, Information Mischief Under the Trump Administration, 94 CHI.-KENT L. REV. 315, 324–35 (2019); see generally Web Integrity Project, SUNLIGHT FOUND., https://sunlightfoundation.com/web-integrity-project/ (last visited July 10, 2019) (publicizing efforts to “monitor changes to government websites, holding our government accountable by revealing shifts in public information and access to Web resources, as well as changes in stated policies and priorities”).} By reducing the quantity and availability of this data, as well as efforts to develop innovative programs and policies,\footnote{For example, the Trump administration’s National Action Plan for Open Government, which was delayed prior to release, merely compiled and listed existing open data programs rather than announced new ones, as had previous reports. See Jessie Bur, New open government plan doubles down on old priorities, FED. TIMES (Feb. 25, 2019), https://www.federaltimes.com/management/2019/02/25/new-open-government-plan-doubles-down-on-old-priorities/; Tajha Chappellet-Lanier, U.S. finally submits fourth National Action Plan for Open Government, FEDSCOOP (Feb. 22, 2019), https://www.fedscoop.com/national-action-plan-open-government-2019/}. The Trump administration did not meet the standard of transparency set by the previous administration.

Although significant, the Trump administration’s departure appeared incremental rather than radical or disruptive.\footnote{See generally Koenig, supra note 144 (describing increase in FOIA requests and litigation since Trump’s inauguration, noting that his administration had been less responsive and open than its predecessor, but not characterizing Trump Administration as uniquely or radically disruptive).} The Obama administration may have met its FOIA obligations more effectively than its successor, but transparency advocates frequently complained about its failure to respond to FOIA requests from journalists and public interest organizations,\footnote{Transparency advocates were disappointed in the failure of Obama’s administration to live up to the President’s stated commitment to transparency. See, e.g., Jameel Jaffer, Government Secrecy in the Age of Information Overload, SHORENSTEIN CENTER ON MEDIA, POL. & PUB. POL’Y (Nov. 6, 2017, 10:40 AM), https://shorensteincenter.org/jameel-jaffer-salant-lecture-2017/; Daniel J. Metcalfe, From FOIA Service to Lip Service: The Unexpected Story of White House Visitor Logs, 36 ADMIN. & REG. L. NEWS 3, 3 (Spring 2011) (expressing disappointment at Obama Administration’s resistance to releasing White House visitor logs); John Wonderlich, Obama’s DOJ Seeks to Weaken the FOIA, SUNLIGHT FOUND. (Oct. 28, 2011, 5:36 PM), https://sunlightfoundation.com/2011/10/28/obamas-doj-seeks-to-weaken-the-foia/. Scholars shared advocates’ disappointment. See Derek E. Bambauer, Chutzpah, 6 J. NAT’L SECURITY L. & POL’Y 549, 561 (2013); Heidi Kitrosser, “Trust Me” and Transparency Do Not Mix, 2017 U. ILL. L. REV. ONLINE: TRUMP 100 DAYS (Apr. 29, 2017), available at https://illinoislawreview.org/symposium/first-100-days/trust-me-and-transparency-do-not-mix/; Ronald J. Krotoszynski, Jr., Transparency, Accountability, and Competency: An Essay on the Obama Administration, Google Government, and the Difficulties of Securing Effective Governance, 65 U. MIAMI L. REV. 449, 467 (2011); Jennifer Shkabatur, Transparency With(out) Accountability: Open Government in the United States, 31 YALE L. & POL’Y REV. 79, 90 (2012).} and argued that it had prioritized the release of open data
over responding to FOIA record requests. While the increase in recent legal challenges under FOIA to Trump administration agencies’ disclosure denials likely suggests agencies’ willingness to delay and oppose disclosure, it may also have reflected ideological opposition on the part of private litigants to the administration’s efforts to remove federal regulations imposed under the previous administration. The Trump administration’s higher degree of non-compliance and the increased levels of litigation it faced were not so high as to reflect a universal, coordinated effort to flout FOIA and were not inconsistent with the tendency among Republican administrations to take a less disclosure-friendly approach to FOIA than Democratic ones.

157. See Cary Coglianese, The Transparency President? The Obama Administration and Open Government, 22 GOVERNANCE 529, 534–35, 539–41 (2009); J.B. Wogan, Obama’s transparency record: lots of data, not as much sunlight, POLITIFACT (July 16, 2012), https://www.politifact.com/truth-o-meter/article/2012/jul/16/obama-report-card-transparency-sunlight/. Key members of the Obama administration considered the open data initiative to be more significant for open government than FOIA compliance. See, e.g., Sunstein, supra note 151, at 188 (former director of the Office of Information and Regulatory Affairs under Obama arguing that the “output transparency” released under the open data initiative has a stronger justification than the “input transparency” established by FOIA); Beth Simone Noveck, Is Open Data the Death of FOIA?, YALE L.J. FORUM 273, 274 (Nov. 21, 2016), https://www.yalelawjournal.org/pdf/NoveckFinal_xjaur4gj.pdf (former United States deputy chief technology officer for open government who led Obama Administration’s Open Government Initiative arguing that “open data’s more systematic and collaborative approach represents a radical and welcome departure from FOIA because open data concentrates on information as a means to solve problems to the end of improving government effectiveness”).


In their efforts to remove or reduce existing regulatory mandates while creating new mandates relating to immigration, the Trump administration often circumvented the legally-required processes that, at least in theory, make agencies’ quasi-legislative, administrative rulemaking transparent to the public—one of the key rationales for the Administrative Procedure Act (“APA”). During Trump’s term, courts often reversed many of these agencies’ efforts. One academic otherwise sympathetic to at least some of the administration’s substantive deregulatory goals characterized the Trump EPA’s record as “poor” and “unenviable,” and the product of a staff that lacked “experienced policy hands with the knowledge and expertise to navigate the administrative process.” Less sympathetic scholars characterized the administration’s process (or lack thereof) as “regulatory slop”—reflecting purposeful disregard for well-established requirements to engage with the public in the rulemaking process, insufficient care about whether their efforts are procedurally permissible, and a generalized failure to execute laws faithfully to statutes and the Constitution. 

Administration Attorney General withdrawing Ashcroft memorandum and announcing “a clear presumption: In the face of doubt, openness prevails”).


The Trump administration repeated a particular pattern of disregard for administrative process several times. It attempted to establish a so-called “Muslim Ban,” for example, with a rushed Executive Order from the White House\(^{165}\) following numerous presidential pronouncements suggesting religious animus as its motivation.\(^{166}\) After the administration reissued different iterations of the “ban” in response to serial lower court reversals,\(^{167}\) the Supreme Court finally upheld the third version of the order on the grounds that the relevant statutory authority “exudes deference”\(^{168}\) and the executive action fell squarely within a sphere that the Constitution delegated to presidential action.\(^{169}\) The Court’s majority did not consider the troubling process and public pronouncements upon which the President and his administration relied,\(^{170}\) granting deference that the four dissenting justices, in two separate opinions, would not have given due to the manner in which the ban was put into place.\(^{171}\)

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\(167\). See Hawaii v. Trump, 859 F.3d 741, 756 (9th Cir. 2017) (per curiam), vacated by Trump v. Hawaii, 138 S. Ct. 377 (2017) (mem.) (explaining that the President’s actions “must be scrutinized with caution” because they were “incompatible” with the processes and mandates set out by Congress in statutes (quoting Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 638 (1952) (Jackson, J., concurring)); Int’l Refugee Assistance Project v. Trump, 883 F.3d 233, 267 (4th Cir. 2018), cert. granted, vacated, 138 S. Ct. 2710 (2018), vacated, 138 S. Ct. 2710 (2018) (noting public statements from the President and administration figures that would allow “an objective observer [to] conclude that the primary purpose of the Proclamation [was] to exclude Muslims from the United States”).


\(169\). Id. at 2409.

\(170\). Id. at 2418, 2423.

\(171\). See id. at 2437–38 (Sotomayor, J., dissenting) (asserting that the entire context of the Executive Order’s issuance and development should be considered in evaluating its validity); Id. at 2433 (Breyer, J., dissenting) (agreeing with Justice Sotomayor regarding the existing record of bias). In his separate concurrence, Justice Kennedy expressed disquiet about statements made by government officials during the process of issuing the third Executive Order. See id. at 2424 (Kennedy, J., concurring) (noting that officials, in their unreviewable statements and actions, should take care not to disregard the Constitution); see also William D. Araiza, Animus and Its Discontents, 71 Fla. L. Rev. 155, 170 (2019) (noting lower
recently, the Court held that the Department of Commerce failed to employ “[r]asoned decisionmaking” under the APA to explain its inclusion of a question about citizenship in the 2020 Census.\textsuperscript{172} Multiple agencies repeatedly sought to deny the statutory authority that prior administrations claimed in promulgating regulatory rules without meeting the substantive and procedural requirements in both the APA and enabling acts.\textsuperscript{173} Agencies also splintered the steps involved in rolling back regulations in order to avoid the APA’s requirements to engage in a new notice and comment rulemaking.\textsuperscript{174} And the EPA lost a number of lawsuits as it sought to stay, delay, and ultimately revoke regulations promulgated by the Obama administration—deregulatory efforts that were frustrated or deferred because of the agency’s failure to follow required procedures.\textsuperscript{175}

3. Congressional Investigations

After reclaiming a majority in the 2018 midterm elections, Democrats in the House of Representatives began to use their control over House committees to initiate multiple investigations of President Trump and Executive Branch agencies and officers. Committees issued subpoenas when the administration and current and former personnel resisted demands for documents and testimony.\textsuperscript{176} The disputes that created the
most conflict included the President’s resistance to submit financial information and tax returns, and the White House’s refusal to allow current and former officials to testify before House committees.

Such conflicts between a President and Congress are longstanding and occurred during the Obama administration as well. Congress has long been forced to rely upon its inherent subpoena power to obtain information from a recalcitrant White House and presidential administration, and it is difficult, if not impossible, to compare the extent of the Trump administration’s defiance of congressional demands for information to that of its immediate predecessors. Trump, however, portrayed this interbranch dispute in absolute terms, declaring to reporters on the White House lawn that, “We’re fighting all the subpoenas,” while his White House counsel declared to House leaders that the President would not participate in the “constitutionally illegitimate” efforts to obtain information and characterizing such resistance as the equivalent of “declar[ing] war on the House’s investigation of the executive branch”).


181. Compare, e.g., Kircher, supra note 175 (asserting that the Trump administration resisted congressional oversight to an “unprecedented degree”) with Michael W. McConnell, The Way Trump Is Asserting the Rights of His Office Is Not Impeachable, WASH. POST (May 1, 2019), https://www.washingtonpost.com/opinions/2019/05/01/trump-resists-congressional-subpoenas-thats-what-presidents-do/ (characterizing Trump administration’s response to congressional investigation as “unremarkable” and akin to those of his recent predecessors).

impeachment inquiry. Courts have increasingly served as the sole means to resolve such disputes in recent decades, weakening Congress’s power to obtain information from the Executive without a clear exercise of legislative will. Facing the Trump administration’s expansive view of its constitutional privilege to withhold information and its dismissal of congressional authority, House Democrats moved forward with impeachment rather than face the delays attendant to high-stakes constitutional litigation. The Trump administration’s defiance of a Democratic House majority was neither unique nor remarkable, but it appeared exceptionally public and absolute—part of an unequivocal resistance to information disclosure to any adverse congressional investigation of the President and White House.

4. Informal Disclosure Norms

President Trump’s reluctance to disclose information about his previous and ongoing business concerns further distinguished him from his predecessors.


187. This dispute is ongoing as of this writing. See Trump v. Mazars USA, L.L.P., 140 S. Ct. 2019, 2035-36 (holding that Congressional subpoenas of presidential information can be enforced, but remanding to lower courts the application of a four-part test to balance the competing congressional and executive branch interests); cf. Trump v. Vance, 140 S. Ct. 2412, 2431 (2020) (rejecting presidential claims for absolute immunity from subpoenas in a state criminal proceeding and remanding to lower courts for consideration of other challenges).

188. See Jonathan Adler, All the President’s Papers, 2020 CATO SUP. CT. REV. (forthcoming 2020) (Draft at 1) (“No President has so thoroughly resisted transparency and disentanglement with potential conflicts of interest.”).
doctrines—most notably executive privilege—shield the presidency from the formal openness and ethical requirements that apply more broadly to the executive branch. The same is true of certain statutory and regulatory disclosure requirements, including exemptions from federal conflict of interest rules that prohibit officials from participating in government matters where they have a financial interest. But the President is required to make certain limited disclosures on an annual basis about his financial and ownership interests. Former presidents and presidential candidates have typically disclosed a fuller picture of their private holdings than the law requires to comply with informal expectations and norms. Commonly understood as “unwritten or informal rules of political behavior,” “shared codes of conduct that become common knowledge within a particular community,” or conventions that suggest what one should do while describing what is generally done, norms have long shaped and constrained presidential behavior, even as they have evolved over time. Less directly related to transparency than formal administrative law, such norms concern the public-facing nature of the presidential office.

Consistent with his willingness to challenge a full range of norms that cover presidential behavior and statements, President Trump refused to


192. See infra note 197–207 and accompanying text.


disclose information about the relationship between his administration and his notoriously complex personal finances and family business enterprises. 197 A president’s resistance to financial disclosures is difficult to subject to judicial review and congressional investigation, 198 and concerns a subject that Trump considered privileged well before he entered politics. 199 Most famously, he departed from longstanding precedent among presidents and presidential candidates by resisting calls to release his tax returns. 200 The annual financial disclosure forms he filed with the Office of Government Ethics provided only a bare outline of his income and complex business holdings. 201 He fought a congressional

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committee’s subpoena of his accounting firm to review his financial records,\footnote{See Trump v. Mazars USA, LLP, No. 19-5142, 2019 WL 5089748 (D.C. Cir. Oct. 11, 2019) (upholding congressional authority to issue a subpoena to investigate the President’s finances).} while his Treasury Secretary refused to comply with a congressional subpoena to release his tax returns.\footnote{Alan Rappeport & Nicholas Fandos, Steven Mnuchin Refuses to Comply with Subpoena for Trump’s Tax Returns, N.Y. TIMES (May 17, 2019), https://www.nytimes.com/2019/05/17/us/politics/tnuchin-trump-tax-returns-subpoena.html.}

Trump also declined either to establish a blind trust to hold his investments or to limit his investments to assets like diversified mutual funds over which he would have no control.\footnote{Walter M. Shaub, Jr., Dir., Office of Gov’t Ethics, Remarks at the Brookings Institution (Jan. 11, 2017), available at https://www.brookings.edu/wp-content/uploads/2017/01/20170111_oge_shaubRemarks.pdf.} Blind trusts and mutual funds would protect against corruption from within the White House by either forcing the public disclosure of a President’s assets or shielding the information from the President and those who would seek his favor or do his bidding. Instead, Trump placed his assets into a revocable trust managed by two of his children and a longtime business associate, of which he is the sole beneficiary and over which he appears to retain significant authority.\footnote{See Derek Kravitz & Al Shaw, Trump Lawyer Confirms President Can Pull Money from His Businesses Whenever He Wants, PROPUBLICA (Apr. 4, 2017, 5:53 PM), https://www.propublica.org/article/trump-pull-money-his-businesses-whenever-he-wants-without-telling-us; Steve Reilly et al., Did Trump Keep His 19 Promises to Insulate Himself from His Business? Only He Knows, USA TODAY (Mar. 18, 2019, 9:08 PM), https://www.usatoday.com/story/news/politics/2019/03/18/president-donald-trumps-promises-didnt-end-business-entanglements/5030377002/; Massoglia & Evers-Hillstrom, supra note 200.} He pledged that any profits from foreign governments would be donated to the United States Treasury, but that promise was unenforceable and its fulfillment was impossible to review without full disclosure of his business and financial interests.\footnote{Bernard Condon, Trump Org Donates Nearly $200k to Cover Foreign Profits, ASSOCIATED PRESS (Feb. 25, 2019), https://www.apnews.com/a4349ac80a7048bd61f017fhr9623f; David A. Fahrenthold & Jonathan O’Connell, Trump Organization Says It Has Donated Foreign Profits to U.S. Treasury, but Declines to Share Details, WASH. POST (Feb. 26, 2018), https://www.washingtonpost.com/politics/trump-organization-says-it-has-donated-foreign-profits-to-us-} This hints disclosure forms only require assets held at the end of the reporting period to be disclosed and require only minimal documentation of transactions. Income and property values are also often listed in wide ranges so the total amount may, in actuality, be much higher or lower.

\footnote{See Decca Muldowney et al., A Guide for Digging Through Trump’s Financial Disclosures, PROPUBLICA (May 23, 2018, 5:00 AM), https://www.propublica.org/article/a-guide-for-digging-through-trumps-financial-disclosures (attempting to piece together Trump’s finances and business interests from his financial disclosure form).}
not simply at opacity, but at corruption. As two Trump critics have written, “In ways large and small, he has put the power of the presidency to work for his friends, his family, and himself.” 207

Despite the efforts of President Trump and his administration, information about his administration and finances leaked. The press vigorously covered the administration, relying on documentary leaks and anonymous sources 208—coverage and leaks that Trump frequently assailed, dismissed, and occasionally sought to prevent. 209 Transparency laws and norms, however, demand more of an administration than leaks to the press, and the Trump administration was neither transparent in an absolute sense nor when compared to its predecessor. Courts imposed

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some constraints upon his administration, but its transparency record ranged from troubling—in terms of the administration’s legal compliance—to poor in its dealings with Congress and its flouting of ethical norms regarding the opaque and uniquely tangled web of Trump’s wealth.

B. President Trump’s Populist Transparency

This section presumes that Donald Trump campaigned as a right-wing populist and continued to present himself as such after the 2020 election—a presumption that seems to be the general consensus among experts in the study of populism and conservatism. For purposes of this Article, the fact that he did not govern as a traditional populist, especially on economic and regulatory policy, is less important than his reliance on a populist style in his self-presentation, communication with his followers, and understanding of transparency.

210. See supra Part III.A.ii.

211. The record of his administration’s senior cabinet members and high-level administrators and advisors was little better. Many of them resigned after revelations about their activities both while in office and prior to entering the administration. See Paul Waldman, New Revelations Show the Trump Administration Is Making the Swamp Even Swampier, WASH. POST (June 10, 2019), https://www.washingtonpost.com/opinions/2019/06/10/new-revelations-show-trump-administration-is-making-swamp-even-swampier/; David Leonhardt & Ian Prasad Philbrick, Trump’s Corruption: The Definitive List, N.Y. TIMES (Oct. 28, 2018), https://www.nytimes.com/2018/10/28/opinion/trump-administration-corruption-conflicts.html. The turnover rate at the top levels of the Trump Administration through mid-2019 was far higher than those of all of his predecessors. See Kathryn Dunn Tenpas, Tracking Turnover in the Trump Administration, BROOKINGS (August 2019), https://www.brookings.edu/research/tracking-turnover-in-the-trump-administration/ (showing that the Trump Administration’s turnover rate of senior advisers was as high in his third year in office as his predecessors’ full-term records).


1. Transparency, Live: Trump Rallies

Trump’s rally speeches, delivered in his highly performative, spontaneous style before thousands of attendees and often simulcast by television networks and cable news channels, served as his signature form of direct address to his base. He continued using the basic format of his campaign rallies immediately after the election, and he held more such political events than any recent sitting president, including forty-six in 2018 in the lead-up to that year’s midterm elections, twenty-one in 2019, and ten in early-2020, prior to the COVID-19 pandemic.\(^{214}\) The rallies did not focus on policy in any traditional sense, and he did not use them primarily to announce new initiatives or the nomination or departure of a member of his administration.\(^{215}\) By rarely unveiling or divulging information that his followers and the broader public do not already know, they did not at all resemble the disclosure of records, data, or information that have come to constitute transparency as a legal concept. Instead, the rallies served as a means to extend his campaign and reach his base in a live, telecast performance that focused political and popular attention on Trump and his presidency.

The pre-pandemic rally speeches’ content resumed the narrative he began upon announcing his campaign. They replayed, for the pleasure of Trump supporters and to the anger and dismay of those who opposed him, what was already known: that he based his presidency on a nationalism


\(^{215}\) He did, however, make policy announcements on Twitter just prior to rallies. See, e.g., Aaron Rupar, Trump Blindsides ICE with Mass Deportation Announcement on Eve of Reelection Rally, VOX (June 18, 2019, 3:30 PM), https://www.vox.com/2019/6/18/18683600/trump-mass-deportation-tweet-ice.
that drew moral and racial boundaries around the groups to which his supporters presumptively belong in order to exclude others whom he cast as representing social and political threats to his vision of the nation. His post-election speeches adapted his campaign narrative in light of his victory, the story of which he regularly retold as a combination of stupendous upset and inevitability. America regained its status due to the unprecedented and unsurpassed successes President Trump had achieved: economic growth, as evidenced by the number of jobs created and rising stock indexes; widespread deregulation; tax cuts he signed into law; and the imminent completion of “The Wall” at the U.S.-Mexico border and the forthcoming replacement of “Obamacare” with a far superior health finance system, neither of which occurred during his presidency. His speeches were most specific in the insults he directed at the enemies that stood in his way. These included opposition Democrats, the “fake news,” “Crooked Hillary,” and the special counsel investigation’s “Witch Hunt” and the “Russia Hoax” that caused the special counsel’s appointment. Both within and across performances, his speeches rambled and repeated little that would enlighten or educate the public about his administration, and often misstated or blatantly lied about easily confirmable facts.

But the speeches’ content was secondary to their form and context.


They were raucous spectacles akin to a rock concert and served as a communal, sometimes even joyful experience for those in attendance, allowing them to solidify and proclaim their position as Trump supporters. Attendees laughed at Trump’s jokes and familiar talking points, and they participated by chanting phrases that demonized his enemies. Crowds became as much an element of the televised events as Trump’s own speech—even, at times, engaging in physical altercations against anti-Trump protestors and the press. Although they already knew in advance how Trump’s speech would proceed, either from attending previous ones or watching them on television, audience members claimed to feel renewed by his repertoire and mix of repetition.


and structured improvisation as well as by their own collective response. Some traveled long distances to attend rallies, arriving hours before scheduled start times to mingle and stand in line for seats while wearing or purchasing branded merchandise to announce their loyalty. The rallies reached their tragic apotheosis on January 6, 2021, with the “Stop the Steal” rally at the Ellipse to protest Congress’s certification of the electoral college vote, which inspired his supporters to march to the Capitol and a mob of them to invade it.

The rallies’ performative, repetitive, nearly ritualistic qualities may not have revealed the state and its actions in any formal legal sense, but they served as a key form of communication from Trump to his supporters. They displayed his emotions and personal beliefs as they demonstrated his willingness to speak his mind (and his followers’ feelings) even at the risk of giving offense. His followers viewed his willingness to speak bluntly, humorously, and offensively as a form of truth-telling. As president, Trump seemed “authentic”—a term his supporters used to refer to his unrehearsed, plain-spoken, and ultimately transparent rhetoric and style of address.


their knowing untruth paradoxically appeared to establish that he hid nothing and that he was more accessible and public than previous presidents. His diction relied on simple, informal, and short nouns and action verbs that he repeated frequently, enabling his speeches to seem comprehensible and direct. His hand and body gestures, often mocking and comical in ways that more careful and studied politicians avoid, further accentuated his bond with his followers (who understood his jokes and found them funny) and his differences from those whom he mocked.

Given regularly in a mass, live setting among devoted followers, and then broadcast live semi-regularly on Fox News, Trump’s speeches offered a collective experience that felt authentic—even to those who opposed him, who viewed his speeches as accurately reflecting his beliefs and prejudices. In his rallies, Trump stood and spoke as a singular leader in front of thousands, claiming to represent millions of like-minded citizens and to reveal their shared concerns and identity.


2. Transparency in 240 Characters: @realDonaldTrump

President Trump’s Twitter account pursued a similar mode of address as his speeches. He created the @realDonaldTrump account in 2009 to spread his opinion and extend his brand, and he credits Twitter with helping him secure the 2016 election by giving him a platform “to bypass . . . unfair media coverage and speak directly to voters.” In a stipulation as part of litigation over whether the Constitution allowed him to block users from his Twitter account, President Trump stated that since his inauguration in 2016 and with the assistance of White House Social Media Director Daniel Scavino, he used the @realDonaldTrump account “to announce, describe, and defend his policies; to promote his Administration’s legislative agenda; to announce official decisions; to engage with foreign political leaders; to publicize state visits; [and] to challenge media organizations whose coverage of his Administration he believes to be unfair.”

His first press secretary declared that tweets from the @realDonaldTrump account should be considered “official statements by the President of the United States,” and his tweets were often posted from both his personal account and the official presidential account (@POTUS) within minutes of each other.

Despite their official nature and his Twitter account’s status as a public forum, President Trump’s tweets appeared spontaneous, unfiltered,
honest, and, above all, authentically Trumpian—the product of whatever was on his mind at the moment of its sending. 237 They revealed his thoughts, they invoked his supporters as “Americans” and “the people” (and called out his opponents as neither), and they very occasionally announced administration policy as well as political appointments and resignations. 238 They were “punchy,” timely, and ephemeral—and thereby newsworthy and attention-grabbing. 239 Their misspellings, typographical errors, and dramatic use of all-caps further accentuated the account’s authenticity, distinguishing his voice from that of the polished, professional campaigners who allow their accounts to be managed by paid professionals. 240 They also made his account appear similar to those of his base of supporters. 241 Indeed, his tweets both previewing and during the “Stop the Steal” rally that preceded the Capitol riot and insurrection


238. According to an online archive of his tweets, the Twitter accounts he most frequently mentioned were his own and those of his family and Fox News and its hosts; as of August 1, 2019, his presidential tweets have invoked “Fake News” (362 times), Russia and “collusion” (452 times), and “Clinton” (212 times). During the 2016 presidential campaign, Trump’s account was far less likely to take a position on a particular issue than Clinton’s account, but much more likely to attract attention in the news media. See Heather K. Evans, Kayla J. Brown & Tiffany Wimberly, “Delete Your Account”: The 2016 Presidential Race on Twitter, 36 SOC. SCI. COMP. REV. 500, 503–07 (2017).


240. Enli, supra note 237, at 59.

were read by many of his followers as direct invitations to disrupt the peaceful transfer of power—and ultimately led Twitter to ban him from its platform. By relying more heavily on Twitter than on press releases and formal and official statements, Trump’s campaign and presidency intimated that his sentiments exclusively constituted the direction of the White House, executive branch, and nation.

C. Conclusion

The Trump administration did not make the federal bureaucracy more visible in a technical sense (although he shrunk parts of it, most notably the State Department and National Security Council), and his administration’s compliance with administrative laws including FOIA were marginally worse than that of his immediate predecessor. He explicitly refused to follow presidential norms regarding information disclosure about his personal finances—types of documents over which courts and Congress failed to exercise clear authority and to which

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246. On challenges under the Emoluments Clause and efforts to require release of his tax forms, see supra note 198.

247. Challenges to the President’s ongoing business interests under the Emoluments Clause failed. See, e.g., In re Trump, 928 F.3d 360, 379 (4th Cir. 2019) (holding that plaintiffs lacked standing to sue under Emoluments Clause); Efforts to secure his tax returns through congressional investigations and state legislation did not bear fruit during his presidency. See Jeff Stein, Rachael Bade & Jacqueline Aleman, ‘It’s Going to Be Tough’: House Democrats Appear Less Likely to Get Trump’s Tax Returns Before 2020
Trump held fast as a private citizen. Transparency advocates and corruption foes like Citizens for Responsibility and Ethics justifiably claimed that President Trump had done “exactly the opposite” of draining the swamp, leading public venality “into uncharted territory, innovating forms of corruption.”

But President Trump and his Twitter account were the “real” Donald Trump, at least to his followers. The public could know and understand his administration simply by paying attention to him rather than to the documents and statements issued by the White House and his surrogates. What you saw in his direct public address was what you got: he spoke for his followers, pronouncing their truth bravely, humorously, and offensively. He appeared transparent. And those in the press and among his political opposition who challenged him and his presentation of the truth surely must lie and keep secrets of their own. They were simultaneously at least as bad as Trump and unable to pass authoritative judgment on him. His mode of communication—lacking in specifics, full of hyperbole and often downright lies—thus constituted a transparency that deemphasized the technocratic in favor of the personal, populist, and, ultimately, political.

V. TRANSPARENCY BETWEEN POPULIST POLITICS AND TECHNOCRATIC ADMINISTRATION

Donald Trump’s claims of transparency are one part of the broader populist style that he exemplified as president. Like other nationalist, right-wing populists who have won recent elections, Trump claimed to uphold transparency as one among numerous of the “general signifiers”

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of democracy. Like other populists, he used (and is likely to continue to use) new communications platforms to speak directly to his followers and to present them with at least a veneer of an authentic voice. As the political theorist Nadia Urbinati has argued:

A populist government relies on, but also reinforces and amplifies, a strongly opinionated audience that clamors for the direct translation of its opinions into decisions. This audience becomes intolerant of dissent and disparaging of pluralism; and, in addition it claims full transparency, a “virtue” that is supposed to expunge the “hypocrisy” of pragmatic politics.

This is a different understanding of transparency than the one that the Freedom of Information movement has developed. Deeply partisan and political, Trump’s transparency was subject not only to his agenda and whims, but also to his false statements and outright lies.

Trump frustrated his opponents with his failure to meet transparency’s technocratic rules and normative expectations that at least in theory are subject to the neutral rule of law and to widely-held and generally-applicable norms. But his supporters not only found those rules and expectations irrelevant, they may have even enjoyed the degree to which his administration frustrated laws enforced by his opponents and the bureaucratic “deep state” and that were utilized by the mainstream press to criticize him. This is clear hypocrisy. Trump and his supporters

252. Giuseppe Zaccaria, The People and Populism, 31 RATIO JURIS. 33, 42 (2018). Trump was like other contemporary populists in this regard, even if he governed somewhat differently. Compare, for example, Philippines president Rodrigo Duterte, who shares Trump’s communicative style but who governs more violently, see Nicole Curato, Flirting with Authoritarian Fantasies? Rodrigo Duterte and the New Terms of Philippine Populism, 47 J. CONTEMP. ASIA 142 (2017); and Hungary’s Victor Orbán, who shares Trump’s tendency to warn of secret conspiracies that threaten the people and his party’s rule but who governs more paternalistically (and corruptly), see Zsolt Enyedi, Paternalist populism and illiberal elitism in Central Europe, 21 J. POL. IDEOLOGIES 9 (2016).

253. See Moffitt, supra note 42, at 91–92 (noting the relationship between contemporary populism and social media); see generally ANGELA NAGLE, KILL ALL NORMIES: ONLINE CULTURE WARS FROM 4CHAN AND TUMBLR TO TRUMP AND THE ALT-RIGHT (2017) (chronicling the rise of the online alt-right and its relationship to the 2016 election and Trump’s racial and gender politics).


255. This enjoyment in transgression, engaged by trolling the righteous norms of elites, is an example of what David Karpf identified as Trump’s supporters’ tendency to act as a weaponized, automated affective public—a networked public formation mobilized through sentiment. See David Karpf, Digital politics after Trump, ANNALS OF THE INT’L. COMM. ASS’N, DOI:
continued to express outrage over Barack Obama’s “missing” birth certificate and Secretary of State Clinton’s private email server, but were at most apathetic about Trump’s refusal to issue his tax returns and about his and his administration’s efforts to control his personal and presidential information. His followers and most of his fellow Republicans either ignored the administration’s efforts to resist disclosure or affirmatively applauded them.

President Trump’s embrace of a populist approach to transparency allows several important insights: first, about transparency’s relationship to populism and the resulting tensions within transparency as an administrative norm; and second, about the long-term effects that a populist leader might have on transparency’s role in a democracy.

A. Transparency, Between Populism and Technocracy

Transparency has always registered in a populist, moralistic voice, from the Progressive Era and Justice Louis Brandeis’ use of sunlight as a metaphor to the post-Watergate efforts to establish new open government mandates and strengthen existing ones. Its advocates promise that transparency can transform a distant state apart from and in opposition to the public into an authentically democratic one. This populist promise sits at the core of all manifestations of transparency as a concept. It provides a utopian basis for believing in the transformative potential of an administrative norm to enhance democracy, and it explains why even the most mainstream politicians who oppose many of populism’s manifestations must nevertheless embrace parts of its program.

Transparency and populism envision a more authentic relationship between the state and public, and both have no essential relationship with a specific political party or set of substantive ideological or policy commitments.

Just as transparency incorporates populist politics, populism—even in


256. See supra Part II-C.

257. See FENSTER, supra note 22, at 192.

its right-wing variety—including an ideal of transparency. The latter relies on the direct personal connection felt between followers and leadership and on the ability of the leader, acting on behalf of his public, to use the instruments of the state to the public’s advantage. The people need to know the leader as their representative who maintains their sovereignty—to view him and experience his presentation of an authentic self that represents their beliefs and their sense of the nation without mediation. This was the basis of Trump’s understanding of transparency as a populist norm. By seeing him, the people could see the state.

But transparency, both as a concept and administrative norm, is not entirely a populist project, notwithstanding the historical and conceptual relationship between them. Administrative laws and their advocates do not reject or even question institutional and political pluralism; rather, they would require the state to inform all members of the public, majority and minority alike, of its operations in order to enable political contest among competing voices and institutional accountability. By contrast, populists in power view government institutions, legal mandates, and established, competing political parties as a hinderance to truly popular self-rule. Nor does transparency make identity claims by limiting or favoring its use and benefits to members by party, race, or nationality. Most open government laws allow anyone to request and review information or to attend meetings. Even a citizenship requirement to request information, which exists in some U.S. sub-federal state laws, draws no distinction among citizens and is easy to circumvent. Whereas

259. See Urbinati supra note 21, at 61. The literature on populism offers multiple characterizations of how populist movements view and use existing state and civil society institutions. Compare, e.g., Taggart, supra note 42, at 106 (“Populism has problems with institutions. At the best of times populists regard institutions with distaste, but at times of crisis they begin to view them as malignant.”), with Muller, supra note 6, at 39, 44–46 (arguing that populism does not hate all institutions, so long as the populist leader and movement can exclusively colonize it).


262. See McBurney v. Young, 560 U.S. 221, 237 (2013) (upholding against constitutional challenge Virginia’s law restricting the right to seek government documents to citizens of the state); Gavin Aronsen, This Website Will Help You Outsmart the Supreme Court’s Anti-Transparency Ruling, MOTHER JONES (May 1, 2013), https://www.motherjones.com/politics/2013/05/supreme-court-cracks-down-public-records-access/ (reporting on efforts to pair out-of-state requesters with citizens to cosign requests); see also Questions Linger over Impact of McBurney v. Young Decision, REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS, https://www.rcfp.org/journals/questions-linger-over-impact/ (last visited Aug. 29, 2019), (noting that the decision’s impact would likely be mixed, as states might either underenforce citizenship requirement or remove it altogether).
transparency advocates promote laws and norms as the means for the public to protect itself, populist movements offer themselves as the force that can protect the public from the elites who currently control the state. Populism thus simultaneously includes and is in tension with transparency ideals; and transparency advocates speak in a populist register without necessarily viewing the state as the instrument of an organized elite.

This tension is most apparent in the conflict between the concept’s populist tendencies and the technical, bureaucratic tasks advocates face in making the state more visible— the constitutional provisions, statutes, and regulations that establish the laws that impose transparency. Populist understandings of transparency and technocratic efforts to impose the concept conflict in their theories of governance. Although both seek to establish a more accountable, representative state, the populist view embraces the personal and political while the technocratic view emphasizes neutrality and administration. To be imposed, the simple, visible government that a populist understanding of transparency holds requires a complex, technocratic set of legal and regulatory solutions; but the complex solutions required for visibility obscure the state’s simplicity and prove difficult to understand and enforce. Freedom of Information laws cannot simply reveal the state and

263. See Huq, supra note 25, at 1134-40 (contrasting the populist desire for a simple government and constitutional order with the complex nature of contemporary governance). This tension is not dissimilar from what Louis Michael Seidman has characterized as the “contradiction” that contemporary liberal constitutionalists face between their progressive embrace of government and their populist suspicions of it. LOUIS MICHAEL SEIDMAN, WHY BERNIE IS CONFUSED: POPULIST AND PROGRESSIVE STRANDS IN LIBERAL CONSTITUTIONALISM 71-72 (SSRN working paper, June 24, 2019), available at https://ssrn.com/abstract=3409375. I consider this a tension rather than a contradiction because transparency laws and their advocates further technical mandates even as they might require or utilize populist political arguments. Technocratic laws and populist politics can co-exist in transparency, in other words, but they undercut each other and reveal the improbability of achieving one of them fully, because it would likely come at expense of the other.

264. See supra Part II-A.


266. See Christopher Bickerton & Carlo Invernizzi Accetti, Populism and Technocracy, in KALTWASSER ET AL (eds.), supra note 26, at 326, 329–32.

267. See id. For a discussion of the deterioration of administration as an ideal over the past several decades (and the attendant ascendancy of political powers and “governance as a concept), long predating the current populist wave, see PIERRE ROSANVALLON, DEMOCRATIC LEGITIMACY: IMPARTIALITY, REFLEXIVITY, PROXIMITY 66-69 (2011).
its leader without more complex rules and an additional layer of bureaucracy to establish and enforce administrative procedures. Transparency includes both populist and technocratic strains that pull in opposite directions and unravel each other, rendering each impossible to fully achieve.

In his work on the complex role of disclosure in the relationship between Paraguayan campesinos and the state, the anthropologist Kregg Hetherington concludes, “[t]ransparency is a technocratic language built on the exclusion of the political from governance, which paradoxically requires excluded political actors to make it work.”268 This paradox demonstrates both the need for balancing competing conceptions of transparency and the implausibility of doing so. If a deeply populist form of transparency—whether in the Trumpian style or otherwise—is defined as nothing but politics and personality, then it can prove worthless, even obfuscatory. But if an obsession with technocratic rules and norms overtakes the understanding and enforcement of democratic obligations, then transparency serves only as a fetish object for specialists and is divorced from the democratic public it is intended ultimately to assist and serve.269

Transparency is ultimately a “protean” concept, as David Pozen has characterized it,270 and for much if not most of the public constitutes an administrative norm of at best secondary political importance (if it is important at all).271 It can be articulated in some combination of technical, political, or populist ways at particular historical moments.272

268. See HETHERINGTON, supra note 21, at 189.

269. See Kregg Hetherington, Populist Transparency: The Documentation of Reality in Rural Paraguay, 1 J. LEGAL ANTHROPOLOGY 45, 47 (2008) (noting that Paraguayan populists effectively “couch their appeal to the masses through an appeal to experiential reality which is at odds with the technocratic uses of the term in transparency reforms”).

270. Pozen, Drift, supra note 71, at 104.

271. Cf. Balkin, supra note 74, at 1985-89 (criticizing progressives’ tendency to overestimate how much the public is interested in and follows highly technical, complex political debates).

272. I use the term articulation in the sense in which Stuart Hall initially developed it:

By the term ‘articulation’, I mean a connection or link which is not necessarily given in all cases, as a law or a fact of life, but which requires particular conditions of existence to appear at all, which has to be positively sustained by specific processes, which is not ‘eternal’ but has to be constantly renewed, which can under some circumstances disappear or be overthrown, leading to the old linkages being dissolved and new connections—re-articulations—being forged. It is also important that an articulation between different practices does not mean that they become identical or that one is dissolved into the other. Each retains its distinct determinations and conditions of existence.
Transparency advocates and President Trump’s political opponents contest the extent of the administration’s compliance with rules and norms in courts, public debates, and political campaigns—in the process combining a technocratic critique of Trump and his administration’s failure to meet legal standards with a populist critique of his administration’s penchant for information control as a symptom of his corruption. Advocates who focus on expanding and enforcing technocratic transparency rules rightly protested when President Trump violated governing norms as part of the political contest over democratic governance. But they should not dismiss Trump and his supporters’ moral and populist understanding of transparency without recognizing that transparency’s operation and legitimacy rest on a populist politics, and that an emphasis on technocratic rules at the expense of populism may alienate or bore the public and thereby render the norm powerless.

B. Populism and the Potential Disfigurement of Transparency

President Trump’s departure from existing transparency rules and norms—incremental differences in some respects, more brazen refusals to conform in others—not only represented a variance in compliance with open government mandates, but risked the weakening of an important, if second-order, democratic value. This is not a problem unique to populism, however. Given current levels of political partisanship in the U.S., transparency’s significance depends upon how it is used against a particular individual, party, or bureaucracy.273 Contrast, for example, the outrage that Republican members of Congress expressed about the Obama administration’s refusal to disclose documents to the investigative committees their party chaired to their vocal support of the Trump administration’s similar refusal to committees controlled by


273. See supra Part II-B (describing the role of politics in transparency’s rise and the norm’s use as a weapon against political opponents).
Democrats—as well as the Democrats’ parallel reversal. Voters and the broader public support a particular elected official, candidate, or party based more on substantive, symbolic, or partisan concerns than for fealty to transparency as an abstract administrative norm enforced by technocratic rules. Transparency is politically imposed on a political system; it is not surprising, therefore, that compliance with Freedom of Information laws matters more to the party out of power than for the executive against whom it is used, and that interest in compliance also reverses in partisan fashion when political fortunes shift. President Trump’s distinct relationship to transparency accentuated a phenomenon that has existed since the very beginning of the open government movement.

The danger that all populist movements represent upon winning elections and assuming power is that their skepticism of pluralistic norms and democratic institutions ultimately disfigures those norms and institutions and subverts democracy. A purely populist understanding of transparency, divorced from the technocratic rules and institutional machinery required to force disclosure, will harm democracy and accountability. Notwithstanding his flaunting of disclosure norms regarding his financial interests, President Trump and his administration did not successfully destroy or abandon transparency as an administrative norm. They were challenged by other branches of government and the press in their efforts to staunch the flow of government information. At the same time, his emphasis on a more personal, affective notion of transparency via public rallies and social media threatens rebalancing transparency towards a populist, more explicitly political mode of transparency. This shift may have long-term, disfiguring effects on open government law and norms, and especially on executive branch compliance with it.

